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Goldcourse Sdn Bhd v Asaztera Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D-25NCC-3 OF 2010
MOHAMAD ARIFF J
11 OCTOBER 2010

Arbitration — Award — Setting aside — Award in favour of main contractor — Completion of project had become at large — Work completed within reasonable time — Whether error of law on face of award — Whether exceptional circumstances established to set aside award — Reasonableness of extension of time — Whether essentially evidential in nature — Whether permissible to review an arbitrator's assessment of evidence on any ground of reasonableness

The applicant and the respondent were the employer and main contractor, respectively, under the articles of agreement based on PAM standard contract. The dispute between the parties was centred on the delay in the completion of the construction of a 23 storey hotel and shopping development. There was a total delay of 456 days for Phase I and 565 days for Phase II. The dispute was referred to arbitration. The arbitrator made the award in favour of the main contractor on the ground that time for the completion of the project had become at large, and further, the main contractor had completed the works within a reasonable time and therefore entitled to its claim. Dissatisfied with the award, the applicant applied to set aside the award on two grounds, namely (a) misconduct; and (b) error of law on the face of the award. The applicant contended that the methodology used by the arbitrator in assessing the delay was wrong in law as it led to absurdity. The applicant further contended that the arbitrator had not stated what in his mind amounted to a reasonable time, and therefore did not make a proper assessment on the evidence. The applicant also contended that cll 23 and 24 of the articles of agreement, when read together, indicated a clear intention of the parties not to regard time as being set at large for acts of prevention.

Held, dismissing the application with costs to be taxed:

(1) The statutory jurisdiction of the High Court in setting aside or remit an award is a limited one and challenge should be allowed only in exceptional circumstances. The High Court does not sit in judgment on the correctness of the claim on its merits, and re-examine the evidence before the arbitrator. If the award has been reached fairly and the parties have been given adequate opportunity to present their grievance before the arbitrator, the decision of the arbitrator should not be upset (see paras 30 & 32).

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(2) The principles on error of law on the face of the award require the applicant to be able to show some legal proposition material to the decision which has been applied by the arbitrator erroneously, resulting in a miscarriage of justice. Within this broad category of error of law, it includes a wrong application of the relevant law or a failure to apply the relevant law. The award can be challenged where the arbitrator has applied principles of interpretation which the law does not countenance. Nevertheless, an error of interpretation per se does not come within the rubric of error of law on the face of the award; something more is needed. The error must be manifest and material to the decision. On the whole, there has been no failure to perform the essential duties which were cast on an arbitrator as, for instance, a failure to observe the rules of natural justice, or the existence of appearance of bias or partiality (see para 52).

(3) In this present application there were no exceptional circumstances to allow this court to set aside the award on the grounds of misconduct and/or error on the face of the award. The issues raised by the applicant to be essentially evidential in nature. They purported to challenge findings of the arbitrator based on the evidence on the main issue in this arbitration, namely whether the extension of time allowed until the date of practical completion was reasonable (see para 52).

(4) Further, it was not permissible for this court to review an arbitrator's assessment of the evidence on any ground of reasonableness. An arbitrator remains master of the facts. In any event, there has to be something radically wrong or preposterous for the court to interfere. The facts of this instant application did not lead to this conclusion. So long as each party is given a fair opportunity to present and argue its case, and there is no evidence of unfairness or bias, the decision of the arbitrator should be respected, the arbitral tribunal being the forum of choice of the parties (see paras 56–57).

[Bahasa Malaysia summary

Pemohon dan responden merupakan majikan dan kontraktor utama, masing-masing tertakluk di bawah fasal-fasal perjanjian berdasarkan kontrak standard PAM. Pertikaian di antara pihak-pihak bertumpu terhadap kelewatan menyiapkan pembinaan hotel 23 tingkat dan bangunan membeli-belah. Jumlah kelewatan untuk Fasa I adalah 456 hari dan 565 hari untuk fasa II. Pertikaian tersebut dirujuk kepada timbang tara. penimbangtara memberi award kepada kontraktor utama atas alasan masa untuk menyiapkan projek tersebut telah ditetapkan secara bebas dan selanjutnya, kontraktor utama telah menyiapkan projek tersebut dalam masa yang munasabah dan oleh itu, berhak untuk tuntutan mereka. Tidak berpuas hati dengan award tersebut, pemohon memohon untuk mengetepikan award bersandarkan dua alasan, iaitu (a) salah laku; dan (b) kesalahan di sisi undang-undang pada permukaan award. Pemohon menghujah bahawa kaedah yang digunakan oleh penimbangtara

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dalam menaksirkan kelewatan adalah salah di sisi undang-undang memandangkan ia adalah tidak munasabah. Pemohon selanjutnya menghujah bahawa penimbangtara tidak menyatakan pendapat beliau mengenai apa yang dimaksudkan dengan masa yang munasabah dan oleh itu, tidak membuat penilaian yang teliti ke atas keterangan. Pemohon juga menghujah bahawa klausa 23 dan 24 fasal-fasal perjanjian, sekiranya dibaca bersama, menunjukkan secara jelas tujuan pihak-pihak untuk tidak menetapkan masa secara bebas untuk tindakan berjaga-jaga.

Diputuskan, menolak permohonan dengan kos untuk ditaksir:

(1) Bidang kuasa statutori Mahkamah Tinggi untuk mengetepikan atau meremit award adalah terhad dan cabaran hanya dibenarkan dalam keadaan-keadaan tertentu. Mahkamah tidak membuat penghakiman mengenai ketepatan tuntutan berdasarkan merit-merit dan memeriksa keterangan yang dikemukakan terhadap penimbangtara. Sekiranya award telah didapati secara adil dan pihak-pihak telah diberikan peluang yang mencukupi untuk mengemukakan aduan mereka di hadapan penimbangtara, keputusan penimbangtara tidak sepatutnya disangkal (lihat perenggan 30 & 32).

(2) Prinsip-prinsip kesalahan di sisi undang-undang pada permukaan award memerlukan pemohon untuk menunjukkan beberapa usul undang-undang yang penting dalam keputusan yang digunapakai secara silap oleh penimbangtara, hingga mengakibatkan ketidakadilan undang-undang. Dalam kategori kesalahan undang-undang yang meluas, ia termasuk kesilapan menggunapakai undang-undang relevan atau kesilapan mengaplikasikan undang-undang yang relevan. Award boleh dicabar apabila penimbangtara menggunakan prinsip-prinsip penafsiran undang-undang yang tidak dipersetujui. Walau bagaimanapun, kesalahan penafsiran tersebut tidak termasuk di dalam ruang kesalahan di sisi undang-undang pada permukaan award, ianya mestilah sesuatu yang melebihi perkara tersebut. Kesalahan tersebut perlulah jelas dan penting terhadap keputusan tersebut. Pada keseluruhannya, tidak terdapat kegagalan menjalankan tugas penting sebagai penimbangtara seperti; kegagalan untuk mengamalkan prinsip-prinsip undang-undang asasi, atau kewujudan sikap berat sebelah atau berpihak (lihat perenggan 52).

(3) Di dalam permohonan ini, tidak terdapat keadaan-keadaan tertentu yang membenarkan mahkamah untuk mengetepikan award atas alasan salahlaku dan/atau kesalahan pada permukaan award. Isu-isu yang ditimbulkan oleh pemohon adalah bersifat keterangan. Mereka bertujuan mencabar dapatan penimbangtara berdasarkan keterangan isu

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utama timbang tara ini, iaitu sama ada lanjutan masa dibenarkan sehingga tarikh penyempurnaan praktikal adalah munasabah (lihat perenggan 52).

(4) Selanjutnya, mahkamah tidak dibenarkan untuk mengkaji semula penilaian keterangan penimbangtara atas alasan kemunasabahan. Seorang penimbangtara kekal menjadi seorang yang lebih mengetahui fakta-fakta. Dalam mana-mana keadaan, mahkamah hanya campur tangan apabila terdapat sesuatu yang secara radikalnya salah atau tidak masuk akal. Fakta-fakta di dalam permohonan ini tidak menunjukkan kesimpulan sebegini. Selagi setiap pihak diberikan peluang yang sama untuk mengemukakan dan mempertikaikan kes mereka dan tidak terdapat sebarang bukti ketidakadilan atau berat sebelah, keputusan penimbangtara seharusnya dihormati memandangkan tribunal timbangtara merupakan forum pilihan pihak-pihak (lihat perenggan 56–57).]

Notes

For cases on setting aside, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1628–1692.

Cases referred to

AC Ho Sdn Bhd v Ng Kee Seng (T/A Konsultant Senicipta) [1998] 2 MLJ 393, CA (refd)

Balfour Beatty Building Ltd v Chestermount Properties (1993) 62 Build LR 1 (refd)

Cairns Energy India Pty Ltd & Anor v Government of India [2009] 6 MLJ 795; [2010] 2 CLJ 397, CA (refd)

Chai Ming v The Overseas Assce Corp Ltd [1962] MLJ 282, (refd)

Champsey Bhara & Co v Jivraj Baloo Spinning and Weaving Co [1923] AC 480, PC (refd)

Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd [2008] 3 CLJ 791, CA (refd)

Czarnikow v Roth, Schmidt & Co [1922] 2 KB 478, CA (refd)

Edwards (Inspector of Taxes) v Bairstow [1955] 2 All ER 48, HL (refd)

FR Absalom Ltd v Great Western (London) Garden Village Society Ltd [1933] AC 592, HL (refd)

Hartela Contractors Ltd v Hartecon JV Sdn Bhd [1999] 2 MLJ 481, CA (refd)

Hopper, Re (1867) LR 2 QB 367 (refd)

Intelek Timur Sdn Bhd v Future Heritage [2004] 1 MLJ 401, FC (refd)

Lian Hup Manufacturing Co Sdn Bhd v Unitata Bhd [1994] 2 MLJ 51, HC (refd)

Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd [2007] 4 MLJ 113, CA (refd)

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Pioneer Shipping Ltd and Others v BTP Tioxide Ltd (The Nema) [1982] AC 724 (refd)
RS Avtar Singh & Co v NPCC Ltd AIR 1993 Delhi 230 (refd)
Sami Mousawi Utama Sdn Bhd v Kerajaan Negeri Sarawak [2004] 2 MLJ 414; [2004] 2 CLJ 186, CA (refd)
Sharikat Pemborong Pertanaian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)
Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151, FC (refd)
Thamesa Designs Sdn Bhd & Ors v Kuching Hotels Sdn Bhd [1993] 3 MLJ 25, SC (refd)
Union of India v Rallia Ram AIR 1963 SC 1685 (refd)

Legislation referred to

Arbitration Act 1952 ss 24(2), 33

Muhammad Shafee Abdullah (Vasanthi Rasathurai and Lim Yin Yin with him) (Shafee & Co) for the applicant.
Cyrus Das (Edwin Lim and Wan Syarihah Razman with him) (Edwin Lim Suren & Soh) for the respondent.

Mohamad Ariff J:

INTRODUCTION

[1] In Originating Motion No D-25 NCC-3 of 2010, filed under ss 24(2) and 33 of the Arbitration Act 1952, the applicant ('Goldcourse') is the employer whilst the respondent ('Asaztera') is the main contractor under articles of agreement based on PAM Standard Contract 1969. The dispute having arisen between the parties, this was referred to arbitration. The award given by the arbitrator was in favour of the contractor (Asaztera, as the claimant) for a sum of RM12,735,874.73. This is recorded in the final summary, paras 6.01.2 and 6.02 of the final award, as follows:

6.01.2 Final Summary — Claimant
Claimant's Monetary Entitlement as Determined

(i)	Certified amount wrongfully deducted for LAD	RM 1,990,000
(ii)	Retention Sum	RM2,151,078.28
(iii)	Sum due under Final Certificate	RM 4,414,204.22
(iv)	Loss and/or Expenses	RM 1,336,291.69
(v)	Financial Damages	RM 2,844,300.54
	TOTAL	RM 12,735,874.73

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Based on the above, I determine that the Claimant is entitled to a sum of RM12,735,874.73 from the Respondent.

6.02 Respondent's Counterclaim

6.02.1		The Respondent's counterclaim, as found on pages 27 and 28 of the Points of Defence and Counterclaim dated 30th December 2004 and my determination of the issues, in this Final Award, are summarised as follows:-
	(i)	Respondent's Counterclaim: Liquidated and Ascertained Damages amounting to RM5,360,000 for Phase I and Phase II of the Works or alternatively general damages to be assessed for non-completion of the Works within the extended completion date;
		Arbitrator's Determination: The Respondent is not entitled to the claim of RM5,360,000 as Liquidated and Ascertained Damages. The Claimant for general damages is dismissed.
	(ii)	Respondent's Counterclaim: Damages for failure to make good the defects.
		Arbitrator's Determination: The Respondents claim for damages is dismissed.
6.0 2.2		Final Summary - Respondent Based on the above, I determine that the Respondent is not entitled to any payment from the Claimant.

[2] As can be seen from the final summary, the arbitrator dismissed the respondent's entire counterclaim for LAD.

[3] The applicant's counsel, Dato' Shafee, emphasised this point in his submission by arguing, having not said what was a reasonable time, the arbitrator concluded that whatever period the respondent had taken, which was more than double the time originally contracted for completion, was reasonable. There was a total delay of 456 days for Phase I and 565 days for Phase II. Despite extension of time (EOT) of 114 days for Phase I and 172 days for Phase II, there was still a delay of 342 days for Phase I and 393 days for Phase II. And yet not a single day of LAD was granted.

[4] The arbitral proceedings itself took 82 days, and the final award consists of 207 pages of text.

[5] The employer is now applying in the originating motion to set aside the award on two grounds, namely (a) misconduct and (b) error of law on the face of the award.

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[6] The main issues centred on delay in the completion of the construction of a 23 storey hotel and shopping development consisting of five levels of shopping lots, 314 levels of Carpark Lots, and 14½ levels of the hotel on Lot 77, Bandar Klang, Daerah Klang, Selangor.

[7] The learned arbitrator came to a finding that time for the completion of the project had become at large, and further, the contractor had completed the works within a reasonable time and therefore entitled to its claim. See pp 149 and 150 of the award, in particular para 5.04.1. I quote the relevant parts of the award:

> 5.04.1 On the issue of time at large, as pleaded by the Claimant, I find and determine as follows:
>
> (i) the Claimant had submitted that due to the acts of prevention by the Respondent in the Architects failure to revise the contractual date of completion, for delays caused by the Respondent or his agent, as provided for in the Building Contract, time to complete the works were at large and that the Claimant completed them within a reasonable time.
>
> (ii) When time is set at large, the Contractor's obligation to complete the Contract within the specified time for completion is extinguished. The Contractor's obligation then is to complete the Contract within a reasonable time.
>
> (iii) The Respondent had submitted that time at large happened when an act of prevention by the Employer creates delay and that delay is not covered by an Extension of Time provision and to a lesser extent where the provisions of the Extension of Time have not been properly administered or have been misapplied. I accept in principle that these are the grounds on which time, for completion of the works, will be set at large.
>
> (iv) Based on my earlier findings and determinations in this Final Award, in relation to causes of culpable delays and the administration of Clause 23 of the Building Contract by the Architect, I find that both the grounds for bringing about a contractual situation, where time would be set at large, have been established.
>
> (v) I determine that due to the breach of contractual obligations by the Respondent and his agents, that the contractual completion date had been set at large and that the Claimant's obligation under the Contract would be to complete the works within a reasonable time.
>
> (vi) Given the numerous delays caused by the Respondent and his agents, which extended well into the final stages of contractual works, the date of practical completion for Phase I and Phase II, 19th November 1998 and 12th July 1999, respectively are deemed to be reasonable.
>
> (vii) The Respondent thus loses his contractual entitlement to impose liquidated and ascertained damages on the Claimant.

[8] The works under the building contract was to be executed in two phases,

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Phase I and Phase II consisting of the construction and completion of levels one to 15 for Phase I and the construction and completion of level 16 to the roof level for Phase II.

[9] On the facts presented before the arbitrator there was, as seen earlier, a delay of 456 days for Phase I and 565 days for Phase II, which was more than double the original completion date contemplated by the parties. Even with the EOT granted, there still remained 342 days for Phase I and 393 days for Phase II.

[10] One contention of the applicant was that the arbitrator awarded the claim by the respondent without even awarding any sum of liquidated and ascertained damages (LAD) for the long delay, although the applicant itself had been guilty of delay in delivering a critical path item, namely the delivery of an alternative design for 'Post-Tensioning Slab System to the Podium Block' and its construction work. Dato' Shafee put this argument thus:

> ASB knew or ought to have known that this was a 'critical path item' and should there be any delay such delay would have serious consequences and would cause delay to other subsequent and entire works in progress including work to be performed by other nominated Contractors. The timely delivery of various building and furnishing materials would hinge on the progress of ASB work progress.

[11] Stress was placed on how, despite stating the respondent itself having contributed to some delays, the arbitrator still concluded the project had been concluded within a reasonable time and not a single day's LAD was granted. It was argued the arbitrator merely deemed or concluded *simpliciter* the works had been completed within a reasonable time without explaining or justifying what would amount to a reasonable time. Dato' Shafee in his oral submission argued this failure would itself be an error, since an arbitrator is expected to be transparent in arriving at his decision so that those before him will be in a position 'to travel through the same path' or to 'read his mind' and be able to appreciate the full reasoning behind the decision and to decide whether his conclusion is reasonable or otherwise.

THE APPLICANT'S GROUNDS

[12] In the interest of exactness, I quote below the summary grounds stated by applicant's counsel:

> 13 It is our humble submission that the Final Award should be set aside on the following grounds:
>
> 13.1That the Arbitrator had misconducted himself or the proceedings;

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13.2 That the award is bad on the face of it as the principle of law according to which the Arbitrator professed to make his award is erroneous; and

13.3 That the Arbitrator was biased, in breach of the rules of natural justice and tainted with bad faith in coming to his conclusion and the Applicant had genuine doubt whether the various correspondences referred to by the Applicant in the evidence had been taken into account by the Arbitrator.

[13] In the interest of clarity, it is pertinent to note how the grounds are formulated in the notice of motion. I reproduce the relevant parts below:

(1) That the Arbitrator, Mr. Thurai Thuraisingam has misconducted himself or the proceedings in that:

(a) The Arbitrator has failed to identify the documents on which he has based findings, and that the documents before the court did not justify the Arbitrator in making such findings;

(b) The Arbitrator was inconsistent in his approach in assessing the evidence before him such that led him to make contradictory findings;

(c) The Arbitrator had failed to analyse and appraise the relevant and admissible evidence before him;

(d) The Arbitrator failed to make any findings of facts on the two issues.

(2) That the award is bad on the face of it as a principle of law according to which the said Arbitrator professed to make his award is erroneous;

(a) the methodology used by the Arbitrator in assessing the delay was wrong in law as (i) it led to absurdity (ii) failed to consider the obligation on the Respondent to mitigate the delay and (Hi) has not considered or applied the required relevant principles required by PAM form/architectural practice when assessing EOT.

(b) the Arbitrator had misconstrued clauses in the contract — most of the findings of the Arbitrator pertaining to the determination of the Contract was erroneous due to misconstruction of the Clause therein, in particular Clauses 23, 24 and 25.

(3) That the Arbitrator was biased, in breach of the rules of natural justice and tainted with bad faith in coming to his conclusion and the Applicant had genuine doubt whether the various correspondences referred to by the Applicant in the evidence had been taken into account by the Arbitrator.

CLAUSES 23 AND 24 OF THE ARTICLES OF AGREEMENT

[14] I find it relevant to state at the outset, and to emphasise the point, that much argument of the parties was centred on the exact wordings of cll 23 and 24 of the articles of agreement. Two versions were presented before this court. The applicant's argument was the parties had contracted on the basis of certain amended provisions, whilst the respondent argued the applicable contract,

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agreed to by the parties, was the Standard Form PAM Contract 1969 without the additions and deletions to cll 23 and 24 as argued by the applicant, but subject only to the amendments made in the preliminaries. According to the respondent, Bill No 1, 'General Conditions and Preliminaries' refers to amendments to cl 23 specifically as follows:

> Clause 23 - EXTENSION OF TIME
>
> (23 - i) Paragraph 0) is DELETED
>
> (23 - ii) Add new paragraph (k):
>
> (k) failure of the Employer to give possession of the site or any part or parts thereof to the Contractor on the appointed date or dates.

See Tab 4, 'Core Bundle of Further Issue'.

The applicant, however, submits cl 23(i) was amended to read:

> (i) By reason of the opening up for inspection of any work covered up or of the testing of any of the work materials or goods in accordance with Clause 6(3) of these Conditions (including making good in consequence of such opening up or testing), unless the inspection or test showed that the work materials or goods were not in accordance with this Contract *or by reason of any act of prevention or breach of any conditions by the Employer*. (the 'amendments' are in italics)

[15] A determination of what was the exact wording agreed to by the parties is critical to the issue of whether time could be regarded as being at large and therefore the respondent was entitled to a reasonable extension of time to complete the works. The applicant alleged inconsistency in the interpretation of cll 23 and 24 (relevant to its issue of error of law on the face of the award), but the respondent took a clear position that there were absolutely no inconsistencies. A summary of the relevant submission reads:

> 15 As for the Applicant's contention of inconsistencies in the learned Arbitrator's Interpretation and Application of Clauses 23 and 24 of the Contract, the Respondent submits that there were absolutely no inconsistencies. The learned Arbitrator had clearly concluded that time was at large under Clause 23 of the Contract because of the Applicant's preventive acts. Similarly, as for Clause 24 of the Building Contract, the learned Arbitrator has given his reasons (see paragraph 5.0 7.3 (vi) at page 168 and 5.0 7.3 (viii) and (ix) at page 169 of the Award) for concluding that the Respondent is entitled to claim for loss and expenses to the time of actual completion of the works with respect to Phase II of the project.

[16] If 'act of prevention' has been included in cl 23(i), then it will become an excluded item, namely no EOT could be granted for it.

[17] The applicant argued the arbitrator had found the employer had

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committed acts of prevention and therefore contributed to the delay, and because of this, time became at large. Counsel advanced the argument that there were two flaws in this. First, it was expressly covered by cl 23(i), and second, once covered by this clause, time could not be at large. Clauses 23 and 24, when read together, indicated a clear intention of the parties not to regard time as being set at large for acts of prevention. The arbitrator accordingly had committed an error on the face of the award by misinterpreting cl 23.

THE ISSUE OF 'TIME BEING AT LARGE' AND 'ACTS OF PREVENTION'

[18] The case for the respondent was thus in part predicated on there being 'acts of prevention' or hindrance by the employer, and as such, time for completion became 'at large', and the arbitrator came to a correct conclusion. Several authorities were cited before this court in support of this position. I quote them below:

(a) Prof Vincent Powell-Smith, *The Malaysian Standard Form of Building Contract (PAM/ISM 69)*:

> Clause 23 provides for the Architect to grant an Extension of Time on specified grounds and an Extension of Time is grantable on those grounds and no other. The Architect has no inherent power to extend the period for completion and in the absence of an express provision such as Clause 23 he would have no power to do so. Failure by the Architect properly to exercise power to extend time, where any delay to completion is caused by the employer for those for whom those for whom he is responsible in law, relieves the Contractor from his liability to pay or allow liquidated damages (*Doddd v Churton* [1897] 1 QB 562] and the time for completion becomes 'at large', i.e. the Contractor's obligation is then to complete 'within a reasonable time', (at p 88).

(b) Sundra Rajoo, *The Malaysian Standard Form of Building Contract (The PAM 1998 Form)*:

> [Clause 23] do not cover many common delaying events, including acts of hindrance or prevention by the Employer which causes delay to completion. The occurrence of such events would have the effect of putting the time for completion 'at large'. In other words, the provision for liquidated damages in Clause 22 of the PAM/ISM 69 Form (which must be construed contra proferentem) will be rendered unenforceable by the Employer and not covered by the Extension of Time Clause. An Employer cannot insist on a condition being met if it is through his own fault that the condition is not met (at pp 161–162).

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(c) *Thamesa Designs Sdn Bhd & Ors v Kuching Hotels Sdn Bhd* [1993] 3 MLJ 25, a Supreme Court decision which approves and applies the passage cited from *Vincent Powell-Smith*.

(d) Hudson's, *Building And Engineering Contracts* (11th Ed):

> It has been seen that an obligation to complete within a reasonable time sounding only in damages arises either because the contract is silent as to time, or because the specified time has ceased to be applicable by reason of some matter for which the owner is responsible. It remains to consider what is a reasonable time …Reasonableness will be determined in the light of circumstances as they actually exist during the period of performance. (at p 1119)

(e) *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151:

> In dealing with this question we can do no better than be guided by the statement of the law in Hudson's Building and Engineering Contracts …
>
> Among the conclusions reached by the learned author after considering these cases is that in cases where an agreement contains no clause for extension of time for completion, the acts of prevention by the employer whether authorised by the contract or in breach of it or whether the prevention is a cause of part or of the whole of the delay invalidate the liquidated damages clause because by such acts in the words of Parke B in *Holme v Guppy* … and Lord Denning in *Trollope and Colls* … 'the time becomes at large'. Consequently there is no date from which damages could run and therefore no damages could be claimed.

[19] In the course of submission, the English decision of *Balfour Beatty Building Ltd v Chestermount Properties* (1993) 62 Build LR 1, was cited by the applicant to establish, in some way, an error of law. This was answered by the respondent by highlighting that the decision in fact affirms the rule on acts of prevention setting time at large. The following passage appears on p 9 of the report:

> In the absence of an express provision, the consequences of the occurrence of an act of prevention …was that the entire extension of time, completion date and liquidated and ascertained damages code was displaced by a general contractual duty to complete the works within what in all the circumstances was a reasonable time from the date of the act of prevention … failing which the contractors would be liable for unliquidated damages for breach of contract in failing to complete within a reasonable time.

[20] As evident from the list of authorities cited, the law on acts of prevention is well-established. If cl 23 is regarded as operative in its unamended form, it cannot be said the arbitrator has misapplied it by deciding time being set at large.

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THE RESPONDENT'S GROUNDS

[21] Right at the outset, respondent's counsel, Dato' Cyrus Das, placed emphasis on the scope of the application. The main grounds, it was argued, rested on the methodology used by the arbitrator in assessing the delay, argued by the applicant to be wrong in law since it led to absurdity, a failure to consider the obligation on the part of the respondent to mitigate the delay and a failure to consider and apply the relevant principles of law and a misinterpretation or misapplication of cll 23 and 24 in the building contract. It was noted the applicant had not pressed its case on the ground of breach of natural justice.

[22] Dato' Cyrus Das re-emphasised the governing principles to be applied by this court and the distinction to be drawn between appellate errors as opposed to arbitral errors. Relying on the authorities of *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113 and *Intelek Timur Sdn Bhd v Future Heritage* [2004] 1 MLJ 401, counsel stressed the need for exceptional circumstances to exist before this court should interfere. It was stressed that error of law must be an error that vitiated the whole award.

[23] It was argued this present case was a case where a whole host of issues were taken up before the arbitrator, and these were properly addressed by the arbitrator.

[24] Throughout the submission of the respondent was an emphasis on the point that this court was being asked to reopen the evidence that was before the arbitrator.

[25] Both cll 23 and 24 were relied upon by both parties, and cl 23, it was argued, was in fact considered and applied by the architect. The real dispute was not on the interpretation of cl 23, but whether the architect had fairly and impartially exercised his discretion in granting EOT. The question whether the extension should be just 172 days for Phase I or 142 days for Phase II was very much an evidential question before the arbitrator. The issue revolved around the question whether the architect had granted a fair and reasonable extension of time. The arbitrator had found the architect to be biased and unfair in the way he administered the contract. The arbitrator effectively struck out the Certificate for EOT given by the architect. The arbitrator considered the reasons advanced by the respondent as well as the applicant. Against these reasons, the arbitrator reviewed the reasonableness of the Certificate of Non-Completion issued by the architect. The arbitrator then provided his detailed grounds on why he concluded the extension of time granted by the architect was not fair and reasonable. He even considered factors of delay caused by the respondent and made adjustments. Counsel referred to the

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several pages of the award reflecting this process of evaluation of the evidence:

(a) pp 147–148 of the award.

(b) pp 79–145 of the award.

(c) In particular, pp 90 and 94, where the arbitrator noted that the respondent had issued instructions to suspend works.

(d) p 103, on variation works.

(e) p 107, on incomplete information.

(f) p 123, on how the arbitrator made adjustments to the award to take into account delays caused by the claimant/respondent.

[26] At para 5.03.3 of the award, headed 'On the issue of Extension of Time and Certificate of Non-Completion', for instance, the arbitrator found and determined as follows:

(i) Clause 23 of the Building Contract stipulates amongst others that upon it becoming reasonably apparent that the progress of the works is delayed, the Contractor shall forthwith give a written notice of the cause of the delay to the Architect.

(ii) The Claimant's letter … addressed to the Architect, states that the progress of work is delayed and that the date of completion requires to be extended. It also informed the Architect of 14 causes of delay.

...

(iv) Clause 23 of the building contract further stipulates that the Architect shall as soon as he is able to estimate the length of the delay before the date or time aforesaid make in writing a fair and reasonable Extension of Time for the completion of the Works.

(v) The causes of delay as determined earlier in this Final Award, was due mostly to the Respondent's breach of his contractual obligations and the Architect should have thus made a timely decision on a fair and reasonable Extension of Time for completion of the Works. A fair and timely decision on this critical matter should have been taken and communicated the writing before the original contractual completion date for Phase 1, which was 30th August 1997.

(vi) Based on my earlier determination on the causes and significance of delays, the Extension of Time Number 1 for 114 days, is deemed to be grossly inadequate. Critical causes of delay and acts of prevention by the Respondent, cited in the Claimant's letter addressed to the Architect, at CF 2/106 dated 3rd August 1998, were not taken into consideration. The Architect had clearly erred in his assessment for time extension due to the Claimant under the provisions of the Building Contract.

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A

…

(viii) Based on the evidence adduced, it is without doubt that, the Architect had been clearly unreasonable and had not administered Clauses 23 of the Building Contract in a fair and reasonable manner. As such, the Certificate of Non-Completion for Phase 1 dated 26th August 1998, is deemed to be an invalid Certificate ….

B

[27] Dato' Cyrus Das was particularly clear on the general thrust of the respondent's argument, namely this court was being asked to reopen matters of evidence which had been determined very fully by the learned arbitrator. To the argument raised by Dato' Shafee that the abitrator had not stated what in his mind amounted to a reasonable time, and therefore did not make a proper assessment on the evidence, the respondent argued, on the basis of *Sharikat Pemborong Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210, that it would be an intolerable burden on an arbitrator if he were to mention all and every piece of evidence brought before him.

C

D

[28] Seeing the opposing arguments advanced by both sides in the form they took, I feel it is still necessary to restate the first principles governing this court's jurisdiction, even though both parties are agreed these principles are well-settled. Although well-settled, it is in the application of these principles that the parties can differ. The situation is no different on the facts of this present application.

E

[29] I now proceed to restate and consider, in a summarised form, these well-established general principles.

F

THE FIRST PRINCIPLES

G

[30] It must be stated at the outset that the statutory jurisdiction of the High Court in setting aside a remit in an award is limited one and challenge should be allowed only in exceptional circumstances. See *Intelek Timur Sdn Bhd v Future Heritage* [2004] 1 MLJ 401, where the Federal Court regarded it as 'well-settled' law that an arbitration award is final, binding and conclusive and can only be challenged in exceptional circumstances.

H

[31] Siti Norma FCJ states in this case:

I

> The law regarding the effect of an arbitration's award is well settled in that the award is final, binding and conclusive and can only be challenged in exceptional circumstances. As such if an arbitrator had erred by drawing wrong inferences of fact from the evidence before him be it oral or documentary that in itself is not sufficient for the setting aside of his award. 'It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were

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liable to be reopened on the suggestion that some of the evidence had been 'misapprehended and misunderstood' per Raja Azlan Shah J (as he then was) in *Sharikat Pemborong Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210; [1969] 1 LNS 172; (at p 407).

[32] It is plain that the jurisdiction of the High Court extends only to arbitral errors, not appellate errors. The High Court does not sit in judgment on the correctness of the claim on its merits, and re-examine the evidence before the arbitrator. If the award has been reached fairly and the parties have been given adequate opportunity to present their grievance before the arbitrator, the decision of the arbitrator should not be upset. See also the Court of Appeal decision on *Cairns Energy India Pty Ltd & Anor v Government of India* [2009] 6 MLJ 795; [2010] 2 CLJ 397, where it was held an arbitral award should not be upset unless the error was manifest:

Generally, to reopen or re-examination the merits of the case and in effect determine and replace, the findings of … arbitrators … would fly against all established principles. (at p 437)

[33] See also *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113, Gopal Sri Ram JCA regarded it as 'the unanimous view' that the High Court does not enjoy appellate jurisdiction under the Arbitration Act:

It is the unanimous view of all the authorities that the High Court in exercising its statutory jurisdiction under the Arbitration Act 1952 does not enjoy appellate jurisdiction. See, for example, *Purl Construction Pvt Ltd v Union of India* AIR 1989 SC 777, where it was held that:

… a court while examining the objections taken to an award filed by an arbitrator is not required to examine the correctness of the claim on merits. The court cannot sit in appeal over the views of the arbitrator by re-examining and reassessing the materials (at p 124).

[34] *Pembinaan LCL* refers to a useful decision of the Indian Supreme Court, *Union of India v Rallia Ram* AIR 1963 SC 1685 where the following passage appears:

An award being a decision of an arbitrator whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute submitted to him is ordinarily not liable to be challenged on the ground that it is erroneous … The award is the decision of a domestic tribunal chosen by the parties, and the Civil Courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievance in the manner provided by the arbitration agreement (per Shah J)

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[35] See also *Hartela Contractors Ltd v Hartecon JV Sdn Bhd* [1999] 2 MLJ 481, another pertinent judgment by Gopal Sri Ram JCA, where it is emphasised that 'the jurisdiction to set aside or remit an arbitrator's award whether at common law or under statute is one that should be exercised with great care and a proper sense of responsibility' (at p 489).

[36] It will be instructive and helpful to also be reminded of the old yet relevant judgment of Bankes LJ in *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478, where it was said:

> Among commercial men what are commonly called commercial arbitrations are undoubtedly and deservedly popular. That they will continue their present popularity I entertain no doubt, so long as the law retains sufficient hold over them to prevent and redress any injustice on the part of the arbitrator, and to secure that the law that is administered by an arbitrator is in substance the law of the land and not some home-made law of the particular arbitrator or the particular association. To release real and effective control over commercial arbitration is to allow the arbitrator, or the arbitration tribunal, to be a law unto himself, or themselves, to give him or them a free hand to decide according to law or not according to law as he or they think fit, in other words to be outside the law (at p 484 of the report).

[37] A similar sentiment was expressed by Cockburn CJ in *Re Hopper* (1867) LR 2 QB 367, where it was said the courts must not be ever ready to set aside awards where the parties have agreed to abide by the decision of a tribunal of their own selection unless there has been 'something radically wrong' and 'vicious' in the proceedings. This principle was followed by our local courts in *Lian Hup Manufacturing Co Sdn Bhd v Unitata Bhd* [1994] 2 MLJ 51 and *AC Ho Sdn Bhd v Ng KeeSeng* [1998] 2 MLJ 393.

[38] In *RS Avtar Singh & Co v NPCC Ltd* AIR 1993 Delhi 230, and cited in Bachawat's *Law of Arbitration & Conciliation* (4th Ed), (2005) a clear exposition of the main principles is found, which, in my view, can be usefully considered in this application. I quote the relevant passage:

> it is a well-settled principle of law that an award of an Arbitrator who is a chosen judge of facts and of law between the parties cannot be set aside unless an error is apparent on the face of the award or it can be inferred from the award that the Arbitrator has misconducted himself or the proceedings or that he has not applied his mind to the material facts. The court is not sitting in appeal on the award, nor can we assess re-examining the material which was adduced before the Arbitrator. The court cannot examine the correctness of the award on merits nor it is obligatory for the Arbitrator to give detailed reasons. *Unless the court comes to the conclusion that the award is the prosperous or absurd, it cannot set aside nor substitute its own decision in place of the Arbitrator. It will be for the Arbitrator to interpret the contract between the parties*. The award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion or has failed to appreciate the facts. The Arbitrator

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being the final judge of facts and law, the court will interfere only if the Arbitrator arrives at inconsistent conclusions even on its own finding or arrives at a decision ignoring material documents. (Emphasis added.)

[39] From these first principles I now turn to consider the particular rules on error of law on the face of the award and misconduct.

Error of law on the face of the award

[40] Malaysian cases have generally applied the applicable rules as stated in *Halsbury's Laws of England*, that 'where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award'. (*Halsbury's Laws* (4th Ed), as applied in *Intelek Timur*).

[41] See also the Privy Council in *Champsey Bhara & Co v Jivraj Baloo Spinning and Weaving Co* [1923] AC 480 and the House of Lords in *FR Absalom Ltd v Great Western (London) Garden Village Society Ltd* [1933] AC 592.

Champsey Bhara states:

An error of law on the face of the award mean … that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. (per Lord Dunedin)

[42] See *Chai Ming v The Overseas Assce Corp Ltd* [1962] MLJ 282, applying *Champsey Bhara*, where the principle is explained further thus: ' … the law is that in determining whether an award should be remitted or set aside on the ground that there is an error of law appearing on the face of it, the court is not entitled to draw any inference as to the finding by the arbitrator of facts supporting the award, but must take the award at its face value.' (per Suffian J (as His Lordship then was) at p 283).

Misconduct

[43] The leading case remains *Sharikat Pemborong Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210, where misconduct is described in the following terms:

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> In the law of arbitration misconduct is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularity of action which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyse and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated. In my judgment, the plaintiff's complaint is sustainable only if the failure to do so had occasioned a miscarriage of justice that is apparent on the face of the award … (at p 211 of the report).

[44] It is not misconduct to make erroneous findings of law or fact. *Halsbury's Laws of England* (4th Ed), 1991, Vol 2, contains a useful summary of what constitutes misconduct, and I reproduce the relevant passage below:

> Misconduct has been described as 'such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice'. Most cases depend as much upon the terms of the reference and on the surrounding circumstances as upon the conduct of the Arbitrator or umpire, and it is therefore difficult to provide an exhaustive definition of the term.
>
> When an Arbitrator fails to comply with the terms, express or implied, of the Arbitration Agreement, that will amount to misconduct. But, whether or not he complies with those terms, he will misconduct himself if he acts in a way that is contrary to public policy. In particular, it would be misconduct to act in a way which is, appears to be, unfair. Misconduct committed in good faith is sometimes referred to as 'technical misconduct', the all allegations of misconduct asserts the breach of duty. It is not misconduct to make an erroneous findings of law or fact.
>
> Misconduct has been found to have occurred in the following instances, some of which would also give the court jurisdiction to intervene or some other grounds: (1) where the Arbitrator or umpire fails to decide all matters which were referred to him; (2) where by his award the Arbitrator or umpire purports to decide matters which have not in fact been included in the Agreement of reference; (3) where the award is uncertain; (4) where there has been irregularity in the proceedings; but with the complaining party continues with the reference after knowing of the irregularity, he may impliedly agree to that manner of proceeding, or may waive his right to object; (5) where the Arbitrator or umpire has acted unfairly and in breach of the rules of natural justice; (6) where the Arbitrator or umpire delegates any part of its authority, whether to a stranger or to one of the parties, or even to a co-arbitrator; (7) where the Arbitrator or umpire accepts the hospitality of one of the parties, being hospitality offered with the intention of influencing his decision or actually influencing it; (8) where the Arbitrator or umpire appears to be biased has an interest in the subject matter of the reference; (9) where the Arbitrator or umpire takes a bribe from either party (at para 694 of *Halsbury*'s).

[45] In this context, the case law supports a limited jurisdiction to intervene. Lack of appraisal of the law and the evidence is not per se a good ground to set

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aside or remit for reconsideration by the arbitral tribunal. There has to be a 'serious failure' to analyse and appraise 'material' and 'relevant' evidence: *Sami Mousawi Utama Sdn Bhd v Kerajaan Negeri Sarawak* [2004] 2 MLJ 414; [2004] 2 CLJ 186 (Court of Appeal). *Sharikat Pemborong Pertanaian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210: ' … failure to analyse, and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated.' (at p 211).

[46] *Sharikat Pemborong Pertanian & Perumahan* also states the general principles to be applied as follows:

> … this is not a re-hearing … I am not satisfied that the arbitrator had drawn wrong inferences of fact from the evidence. Even if he did, that by itself is not sufficient as a ground to warrant setting aside the award. It would be contrary to all established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been 'misapprehended and misunderstood …' (per Raja Azlan Shah (as His Majesty then was) at p 211).

[47] In the course of submission, Dato' Shafee has also argued on the basis that the methodology used by the arbitrator in assessing the delay was wrong in law as it led to absurdity. The principle that the courts can set aside, remit or vary an award on the basis of illogical conclusions in his decision can perhaps be traced to a passage from Lord Radcliffe's judgment in *Edwards (Inspector of Taxes) v Bairstow* [1955] 2 All ER 48, reading as follows:

> When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination and the appeal. In those circumstances, too, the court must intervene (per Lord Radcliffe).

[48] Dato' Shafee did not cite *Edwards v Bairstow* in argument but I feel it is pertinent to consider this authority since the general argument on absurdity and reasonableness have been raised. *Edwards v Bairstow*, however, is not an arbitration case, but a leading authority on appeals on case stated in tax matters. It was referred to by the House of Lords in *The Nema (Pioneer Shipping Ltd and Others v BTP Tioxide Ltd* [1982] AC 724), an arbitration case. Nevertheless, its relevance in arbitration law is not entirely free from criticism. The learned authors of *Mustill and Boyd* note on p 253, footnote 2:

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> It would have been a surprising step to incorporate the whole of the common law relating to judicial review of the decisions of subordinate tribunals for error of law bodily into the law of arbitration, for the jurisdiction asserted by the courts over such tribunals is being progressively extended by devices quite foreign to the law of arbitration …

[49] As far as English law is concerned, the learned authors of *Mustill & Boyd* also make it clear that the jurisdiction to challenge a finding of primary or secondary fact arrived at without any evidence should no longer be recognised.

[50] This view would accord with the 'general principle that an arbitrator is master of the facts, and with the specific commercial aims of the new system' (at p 596).

[51] Although an award based on a finding of fact without any evidence would be a category of misconduct in Malaysian law (for it would be a breach of the rules of natural justice), the principle in *Edwards v Bairstow* is broader than this proposition. To accept it would make an inroad into the basic principle that an arbitrator is a master of the facts and matters relating to weight of evidence and inferences to be drawn from it are for the arbitrator to decide. The authorities do not then appear to wholeheartedly support an argument that arbitral law allows the review of an arbitral award just on the ground of reasonableness, without more.

EVALUATION AND CONCLUSION

[52] Having considered the award, the extensive submissions of counsel for the respective parties and the applicable law, I am unable to conclude there are exceptional circumstances in this present application to allow this court to set aside the award on the grounds of misconduct and/or error on the face of the award. I find the issues raised by the applicant (Goldcourse) to be essentially evidential in nature. They purport to challenge findings of the arbitrator based on the evidence on the main issue in this arbitration, namely whether the extension of time allowed until the date of practical completion was reasonable. I have earlier already alluded to some of the detailed grounds in the award. The issue of law raised was essentially in relation to which provision in the PAM Contract was to apply, whether the unamended or the amended cl 23, read in conjunction with cl 24. The principles on error of law on the face of the award require the applicant to be able to show some legal proposition material to the decision has been applied by the arbitrator erroneously, which has resulted in a miscarriage of justice. Within this broad category of error of law can be included a wrong application of the relevant law or a failure to apply the relevant law. As is sometimes said, the award can be challenged where the arbitrator has applied principles of interpretation which the law does not

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countenance. Nevertheless, an error of interpretation *per se* does not come within the rubric of error of law on the face of the award; something more is needed. The error must be manifest and material to the decision. In *Intelek Timur*, the Federal Court included within the error of law ground a failure to consider the entirety of the contract. If an arbitrator has failed to address a particular relevant provision in the contract, the award can be vitiated. This however would have to be a matter on the record, and to be gathered from the record itself or some document forming part of, or can be read as part of it.

[53] I have therefore considered the award as an 'entirety', and in so doing, I find that the arbitrator has in fact addressed his mind to the fact that there were unilateral amendments made to the PAM Contract. At pp 145–150 he then proceeded to specifically refer to cl 23, and examined the Architect's Certificate in the context of this clause. The Court of Appeal has stated very clearly in *Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd* [2008] 3 CLJ 791:

> The final award of the arbitrator must be viewed in its totality and any error of law on the face of the award must be one that is patent and obvious as to render the award manifestly unlawful and unconscionable to subsist and, thereby, justify it to be set aside.

[54] On the facts of this case and the record before me, I cannot conclude that it is obvious or manifest that the learned arbitrator has not applied his mind correctly to cl 23 and the fact that there were unilateral amendments made. The record does not show, in the words of Dato' Shafee, that he has 'misapplied' cl 23.

[55] On the whole there has been no failure to perform the essential duties which are cast on an arbitrator as, for instance, a failure to observe the rules of natural justice, or the existence of appearance of bias or partiality. I also do not find any irregularity of action which is not consonant with the general principles of equity and good conscience.

[56] Further, in the present state of the authorities, it is not permissible for this court to review an arbitrator's assessment of the evidence on any ground of reasonableness. An arbitrator remains master of the facts. In any event, there has to be something radically wrong or preposterous for the court to interfere. The facts of this instant application do not lead me to this conclusion.

[57] So long as each party is given a fair opportunity to present and argue its case, and there is no evidence of unfairness or bias, the decision of the arbitrator should be respected, the arbitral tribunal being the forum of choice of the

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parties. The observations in the Indian case of *Union of India v Rallia Ram* AIR 1963 SC 1685, are particular apt for consideration:

> An award being a decision of an arbitrator whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute submitted to him is ordinarily not liable to be challenged on the ground that it is erroneous … The award is the decision of a domestic tribunal chosen by the parties, and the Civil Courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievance in the manner provided by the arbitration agreement (per Shah J).

[58] In these circumstances and for the reasons stated above, I am therefore dismissing this application to set aside the award with costs to be taxed, unless agreed.

Application dismissed with costs to be taxed.

Reported by Ashgar Ali Ali Mohamad